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Reply Brief 1975-SC-0909

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REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-909

FRANK WILEY — APPELLANT

VS. — APPEAL FROM McCRACKEN CIRCUIT COURT
HON. J. BRANDON PRICE, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief For Appellant has been mailed, postage prepaid, to Hon. J. Brandon Price, Judge, McCracken Circuit Court, McCracken County Courthouse, Paducah, Kentucky 42001; Hon. Albert Jones, Commonwealth Attorney, 2nd Judicial District, Paducah, Kentucky 42001; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 12th day of January, 1976.

William M. Radigan

FILED
JAN 12 1976
Marcia Layne Collins
CLERK
Supreme Court Of Kentucky

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SUPREME COURT OF KENTUCKY

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* *

MAY IT PLEASE THE COURT:

PURPOSE OF REPLY BRIEF

THE PURPOSE OF THIS REPLY BRIEF IS TO RESPOND TO THE ARGUMENTS CONTAINED IN THE BRIEF FOR APPELLEE IN THE ABOVE-CAPTIONED CASE.

QUESTIONS TO WHICH REPLY BRIEF ADDRESSED

I.

DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY FAILING TO ORDER, SUA SPONTE, A MENTAL EXAMINATION OF APPELLANT, PURSUANT TO RCr 8.06 AND KRS 504.040, TO DETERMINE HIS COMPETENCY TO STAND TRIAL IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION?

II.

DID THE PROSECUTOR ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY MISSTATEMENTS OF LAW AND BY IMPROPER AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT?

ARGUMENTS

I.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY FAILING TO ORDER, SUA SPONTE, A MENTAL EXAMINATION OF APPELLANT, PURSUANT TO RCr 8.06 AND KRS 504.040, TO DETERMINE HIS COMPETENCY TO STAND TRIAL IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION.

Appellee initially argues that this allegation of error was not "preserved for appellate review by a proper objection" (Appellee's Brief, p. 3). Such an argument is fellacious in the extreme. As explained in appellant's original pleadings (Appellant's Brief, p. 4), a defendant cannot waive his constitutional right to have the trial court determine his competency to stand trial. The Supreme Court in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 841, 15 L.Ed.2d 815 (1966) specifically stated that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial." Consequently, counsel for an incompetent defendant cannot waive the accused's right for him by failing to move for an examination of his competency or by failing to bring the issue before the trial court at all. In Accord: Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967); Smith v. United States, 267 F.2d 210 (9th Cir. 1959); Nelms v. United States, 318 F.2d 150 (4th Cir. 1963). As a result, the issue of competency to stand trial cannot be dismissed through the technical rule relied on by appellee. Appellant submits that this Court is constitutionally required to review the merits of the instant argument.

Appellee next presents a most novel argument that a majority of the federal cases cited in Appellant's Brief are not persuasive as they deal with "interpretation of the Federal statutes" (Appellee's Brief, p. 4). Apparently,

appellee elected not to bother to read and evaluate the basis of these cases. All but two of the Federal cases cited in Appellant's Brief base their decision on the due process nature of the issue of competency which was delineated by the Supreme Court in Bishop v. United States, 350 U.S. 461, 76 S.Ct. 440, 100 L.Ed. 835 (1956) and Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Furthermore, the only two cases which interpret a statute, United States v. Walker, 301 F.2d 211 (6th Cir. 1962) and United States v. Bass, 477 F.2d 723 (9th Cir. 1973), deal with the issue of what constitutes "reasonable cause to believe that a person . . . may be . . . mentally incompetent" 18 U.S. 4244. The similarity between the language in 18 U.S. 4244 and in RCr 8.06 and KRS 504.040 is apparent. Consequently, all of the cases cited in Appellant's Brief in support of this argument provide both authority and precedent for this Court.

Appellee then argues "that there was no reason for the Court to suspect that the appellant was incompetent to stand trial" (Appellee's Brief, p. 6). However, appellee's analysis borders on being incredulous.

Appellee initially reviews the evidence presented at the court below and reaches the conclusion that "appellant had a logical, albeit a criminal, motive to commit murder" (Appellee's Brief, p. 7). Appellee seemingly has a total miscomprehension of competency to stand trial. Appellant submits that the existence or non-existence of motive is completely irrelevant to this allegation of error. The only question is whether there were reasonable grounds to believe that appellant lacked, at the time of trial, "substantial capacity to comprehend the nature and consequences of the proceedings pending against him" Commonwealth v. Strickland, Ky., 375 S.W.2d 701, 703 (1964).

Appellee lastly reviews appellant's conduct at trial and concludes that his memory of the events was "good" and that his testimony was "fluent" (Appellee's Brief, p. 7). This assertion is made in spite of the fact that the trial judge felt compelled to interject on three instances a request that defense counsel assist appellant "organize" his testimony (T.E., pp. 134, 137, 138). At one point appellant's testimony was so rambling and disconnected that the trial judge declared, sua sponte, a ten-minute recess to allow defense counsel to consult with his client (T.E., p. 144). Appellant submits that there is no basis in the record for appellee's contention.

From the testimony of various witnesses, it is obvious that appellant's mental and emotional condition was, at best, unstable prior to the shooting. He suffered from bouts of depression and seemingly was paranoid. Appellant's demeanor at trial was such that the trial judge felt obligated to interrupt appellant's testimony in four instances in attempts to obtain cohesive and logical testimony from him. Finally, appellant's trial counsel expressed serious doubts concerning appellant's mental and emotional conditions.

This Court has held that if there are reasonable grounds to believe the defendant is incompetent, a hearing is required under RCr 8.06. Commonwealth v. Strickland, supra. In Matthews v. Commonwealth, Ky., 468 S.W.2d 313 (1971), this Court recognized that if facts known to the trial judge raise a substantial doubt as to the defendant's mental condition, the trial has a sua sponte duty to conduct an RCr 8.06 hearing.

Under the facts and circumstances of the instant case, the trial judge was required to conduct a hearing to determine appellant's competency to stand trial. Accordingly, appellant submits that this Court is constitutionally required to reverse his conviction by the court below.

II.

THE PROSECUTOR ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY MISSTATEMENTS OF LAW AND BY IMPROPER AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT.

Appellate counsel for the Commonwealth has made little attempt to address the specific improper comments of the prosecutor catelogued by appellant in his initial brief (Appellant's Brief, pp. 10-13). Instead, appellee offers only a perfunctory response to this assignment of error.

The sole allegation responded to at all by appellee involves a misstatement of law by the prosecutor. In his initial brief, appellant submitted that the Commonwealth's Attorney's argument to the jury that in considering the existence of extreme emotional disturbance that the jurors should consider whether they saw a reasonable justification for appellant's actions was contrary to both established law and the trial judge's instructions.

Appellee's sole response was that "appellant does not cite any authority from court decisions that such an act by the prosecutor . . . would require reversal of the judgment" (Appellee's Brief, p. 8). Seemingly, counsel for appellee neglected to read appellant's initial brief. In Bennett v. Commonwealth, 245 Ky. 377, 56 S.W.2d 484, 486-487 (1932), cited on page 11 of Appellant's Brief, this Court held that an argument by a Commonwealth's Attorney which "discounts or nullifies the instructions transcends the limits of fair debate." In the cited case, this Court

concluded that "there is no escape from the conclusion that it was prejudicial to appellant's substantial rights."

Significantly, appellee did not attempt to contravene appellant's argument that the Commonwealth's Attorney's statements were inconsistent with the trial court's instructions. As a result, the merits of the assigned error stand unrefuted and must be considered as being valid.

To the other instance of prosecutorial misconduct referred to and extensively discussed in appellant's initial brief, appellee consistently and concisely repeated his argument that the error was not preserved for appellate review (Appellee's Brief, p. 10). Once again, the attorney for the Commonwealth elected not to discuss or contravene the legal principles and factual statements contained in the allegation of error.

Appellant, in his initial brief, acknowledged that trial defense counsel did not object to this error, but offered a detailed explanation of why appellate review was still available despite the absence of a trial objection (Appellant's Brief, pp. 14-17). Appellee has declined to address appellant's arguments on the question of waiver and has merely relied on the absence of an objection as a procedural basis for denying appellate review.

However, this Court has recognized that an error which deprives a defendant of due process can be the basis for reversal of the conviction even though it was not preserved for appellate review. Jackson v. Commonwealth, Ky., 450 S.W.2d 244 (1970); Futrell v. Commonwealth, Ky., 437 S.W.2d 487 (1969). For this reason, appellee cannot urge that the assigned error may not be reviewed on appeal because it was not objected to at trial. Instead, appellee must demonstrate that the error did not deprive appellant of due process.